IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINAY ORIGINAL CIVIL JURISDICTION

SUMMONS FO JUDGMENT NO.124 OF 2006

IN

SUMMAY SUIT NO.126 OF 2004

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Asoj Soft Caps Pvt. Ltd. ...Plaintiff

v/s.

Glow Export Trading Pvt.Ltd. ...Defendant

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Ms.Aarti Bhide for the Plaintiff.

Ms.Rajni Iyer with Ms.M.H.Lund for the Defendant.

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CORAM: D.K.DESHMUKH, J.

DATED: 31ST JULY, 2006

P.C.:

1. The Plaintiff has filed this suit for recovery of the price of the goods. The goods were supplied under three invoices. According to the Defendant, the Defendant has paid the price of the goods covered by one invoice namely Exh.F. The Defendant has accepted that the Defendant has received the goods under the invoices at Exh.D & Exh.E. The Defendant contended that the Defendant is not liable to pay, because the goods were defective. A submission was made before me on behalf of the Plaintiff that the fact that the goods were defective was pointed out by the Defendant for the first time to the Plaintiff when the Defendant replied to the Plaintiff's notice in November, 2002.

2. Perusal of the reply filed by the Defendant, however, shows that the Defendant has categorically stated in the affidavit filed in reply that the fact that the goods supplied under the invoices at Exhs.D & E to the plaint are defective was pointed out to

the Plaintiff by addressing communication dated 3-5-2002 and further a communication dated 24-6-2002. Reply was filed by the Defendant in April, 2006. There is no counter affidavit filed nor any time was sought when the matter was called for filing rejoinder. The Defendant has produced a copy of the communication dated 24-6-2002. It is further pertinent to note that though the Defendant in the affidavit in reply craves leave of the court to rely on the communication dated 24-6-2002, which clearly points out that goods supplied under the invoices at Exh.D & E are defective, the Plaintiff did not even bother to seek inspection of those documents. The conduct of the Plaintiff of not seeking even inspection of those documents shows that the Plaintiff is in possession of the documents and therefore the Plaintiff did not think it necessary to seek inspection of the documents. A request was made for being granted time for filing counter affidavit after the Plaintiff's arguments were over and in reply the advocate appearing for the Defendant pointed out averments in the affidavit in reply and produced the documents on which the reliance is placed. Obviously, therefore, after having the court spent time on hearing the matter, the matter cannot

be adjourned. The position on the record stand that the Defendant pointed out the defect in the product in May, 2002 and June, 2002. Though a reply was not filed pointing out this communication still the argument was made on behalf of the Plaintiff that for the first time defect was pointed out in a communication of November, 2002. It is clear that the Defendant has good defence to offer and therefore, no decree can be passed in favour of the Plaintiff in the summary jurisdiction proceeding. The summons for judgment is, therefore, disposed of. Defendant is granted unconditional leave to defend the suit. Written statement to be filed within a period of eight weeks from today. Suit be transferred to commercial cause list.

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